INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Argument	5
Conclusion	7

CITATIONS

Cases:	
Avery v. *Commissioner*, 292 U. S. 210	5
Corliss v. *Bowers*, 281 U. S. 376	5
Giannini v. *Commissioner*, 129 F. 2d 638	5, 6
Harrison v. *Schaffner*, 312 U. S. 579	5
Helvering v. *Eubank*, 311 U. S. 122	5
Helvering v. *Horst*, 311 U. S. 112	5
Lucas v. *Earl*, 281 U. S. 111	5
Statutes:	
Internal Revenue Code, Sec. 22 (26 U. S. C. 1940 ed., Sec. 22)	2
Miscellaneous:	
Treasury Regulations 103, Sec. 19.22 (a)-2	2

701486—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 157

WILLIAM ARCHIBALD HEDRICK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Tax Court (R. 10–13) is not reported. The opinion of the Circuit Court of Appeals (R. 23–25) is reported at 154 F. 2d 90.

JURISDICTION

This case involves a deficiency in income tax for the year 1941. The judgment of the Circuit Court of Appeals, which affirmed the decision of the Tax Court, was entered on March 15, 1946. (R. 25.) The petition for a writ of certiorari was filed on June 10, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the amount of money represented by checks received by the taxpayer during the taxable year from his employer for "pre-retirement leave with pay" should be included in his taxable income where, although the taxpayer did not want to accept the pension and refused to cash the checks, he failed to return the checks.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)–2. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; * * *.

STATEMENT

The facts as found by the Tax Court are as follows:

At the beginning of the taxable year 1941 the taxpayer, who was then 57 years old, was employed by the New York Telephone Company at a salary of $45 per week. In June of that year he received notice that his active employment with the company would terminate and that he was eligible for retirement pay under an employees' pension plan then in operation, and was furnished a form on which to make application for such retirement pay. The taxpayer refused to sign the application because he did not want to retire at his age and would not accept any pension because he thought that this might bar him from other employment. He sought reinstatement to active duty with the Telephone Company but was unsuccessful. Since that time he has been employed by other concerns, and according to his testimony, has "done fairly well." (R. 10–11.)

In his tax return for 1941, taxpayer reported salary from the Telephone Company of $1,170 which the Commissioner increased to $1,773. Frank M. Downey, an employee of the Telephone Company who was also secretary of the company's Employees' Pension Committee, testified that in June, 1941, the company had in operation a plan under which a retired employee was given three months' "pre-retirement leave" with pay and that checks for approximately $603, or three months' pay, were sent to the taxpayer in 1941 after he was separated from active service. He further testified that pension checks were still being sent to the taxpayer under a pension plan put into effect soon after the latter left the company. The taxpayer did not deny having received checks in the amount of $603 in 1941. He testified that he had never returned any of the pension checks to the Telephone Company or to the issuing bank which acted as agent for the company in handling the pension trust and that he still had some of the checks in his possession. He did not know how many of the checks he still had or what had become of the others. (R. 11.)

On these facts, the Tax Court held that the Commissioner did not err in adding the amount of $603 (representing the "pre-retirement leave" with pay) to the taxpayer's compensation for 1941. (R. 12.) Accordingly, it found that there was an income tax deficiency in the amount of $212.01 for 1941. (R. 14.)

ARGUMENT

1. The decision below follows the rulings of this Court and is correct. Upon the receipt of the checks in controversy, which the taxpayer could have cashed immediately and which represented payment of an obligation owing to him, the taxpayer realized taxable income since the money became subject to his unqualified command at that time. *Avery* v. *Commissioner,* 292 U. S. 210. The fact that the taxpayer has not, as yet, cashed the checks does not make them any the less his income at the time when received. The decisions unanimously demonstrate that income which is subject to a taxpayer's enjoyment or command is taxable to him regardless of whether he fails to use it himself or diverts its use to others. *Corliss* v. *Bowers,* 281 U. S. 376; *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579. As the Court stated in *Corliss* v. *Bowers, supra* (p. 378):

> The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. * * *

2. The alleged conflict which the taxpayer relies on between the decision below and *Commissioner* v. *Giannini,* 129 F. 2d 638 (C. C. A. 9th), does not exist, the cases being distinguishable in several respects. In the *Giannini* case, the sum

which the Commissioner sought to tax was never received by the taxpayer, and was never set apart for his use or credited to him on the company's books. Opposed to that is the uncontradicted fact in the present case that the checks were received by the taxpayer and were available for his use. Also, in the *Giannini* case it was found that after the taxpayer's refusal to accept the compensation and his suggestion that the company devote the amount to some useful purpose, the company was relieved of any obligation to pay him and was free to dispose of the money as it saw fit. In the present case, as the Tax Court observed (R. 12–13), the taxpayer may still cash the checks and the payor's agent still holds the funds which they represent. Finally, it is to be observed that neither the *Giannini* case nor the present case decided the proposition which the taxpayer relies on as establishing a conflict in decisions, namely (Pet. 4–5), whether refusal to accept earned compensation results in the receipt of taxable income. As the court pointed out in that case (129 F. 2d 638, 641, footnote 1, and see the concurring opinion of Judge Healy), the refusal to accept any compensation for the last half of 1927 took place in 1927 and the only taxable year before the court was 1928. Thus, the decision in that case was based on the conclusion that the taxpayer's refusal to accept the compensation was not followed by anything in 1928 showing con-

structive receipt of income in that year, nothing having been received by the taxpayer and the court having concluded that he did not direct the charitable disposition of the money which the corporation actually made. In the present case, on the contrary, the refusal to accept the compensation was followed by the receipt of checks which the taxpayer has retained, and there was a constructive receipt of income in the taxable year.

Although the correctness of the *Giannini* case is open to serious question, as the opinion of Judge Chase herein indicates (R. 24–25), and although there is some diversity of approach between the two circuits, the decision is nevertheless distinguishable in the respects noted above and therefore does not call for certiorari.

CONCLUSION

The decision below is in accord with familiar principles. There is no conflict in decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
DOUGLAS W. MCGREGOR,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

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